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RESPONDENTS' BRIEF

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

74-
No. 1303

CARL D. BISHOP, *Petitioner,*

v.

W. H. WOOD, *et al., Respondents.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A FEDERAL DISTRICT COURT HAS JURISDICTION OVER A SECTION 1983 CLAIM WHEN A MUNICIPALITY HAS BEEN NAMED, ALONG WITH ITS EMPLOYEES IN THEIR OFFICIAL CAPACITIES, AS DEFENDANT.

II. WHETHER THE $10,000.00 JURISDICTIONAL REQUIREMENT OF 28 U.S.C. SECTION 1331(a) IS SATISFIED BY ALLEGATIONS IN THE COMPLAINT, WITHOUT MORE, WHEN SUCH ALLEGATIONS HAVE BEEN DENIED.

III. WHETHER THE PETITIONER HAD SUCH AN INTEREST IN HIS EMPLOYMENT THAT HIS DISCHARGE AMOUNTED TO A DEPRIVATION OF PROPERTY OR LIBERTY.

A. Did petitioner's discharge from his public employment deprive him of a constitutionally protected property interest.

B. Did petitioner's discharge deprive him of a constitutionally protected liberty interest.

STATEMENT OF THE CASE

On June 9, 1969, Petitioner Carl Bishop was hired by the City of Marion, North Carolina, as a probationary policeman. (A. 57-58) At the end of six months employment, his status changed to that of a permanent employee (A. 19, 24). He continued in the employ of the City until March 31, 1972, when his employment was terminated by the Chief of Police and the City Manager (A.13). After his dismissal and at his request, Bishop was informed by letter that his dismissal was due to unsatisfactory work and failure to attend training schools. (A. 14)

Several months prior to his discharge, Bishop had been the cause of personnel problems, (A. 29-32), and on several occaisions had been warned and counseled by the Chief of Police about his poor attitude and his failure to abide by regulations (A. 25, 29, 30). However, the Chief took no independent action against him, but conferred with the City Manager and was instructed to again "discuss the problem areas with Bishop and make him aware of the consequences if he failed to bring his level of performance up to an acceptable manner" (A. 30). One or two weeks after this conference, Bishop was discharged after the Chief informed the City Manager of his continuing refusal to abide by the Chief's requests. (A. 30) Thereupon this action was instituted by Bishop seeking reinstatement and back pay. (A. 9; Petitioner's brief, 6)

ARGUMENT

I. A FEDERAL DISTRICT COURT HAS NO JURISDICTION OVER A SECTION 1983 CLAIM WHEN A MUNICIPALITY HAS BEEN NAMED, ALONG WITH ITS EMPLOYEES IN THEIR OFFICIAL CAPACITIES, AS DEFENDANT.

Enacted by Congress in 1871, and referred to as the Civil Rights Act of 1871 or the Ku Klux Klan Act, 42 U.S.C. 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, *privileges*, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Simply interpreted, the statute prohibits, on pain of civil liability, any "person" from depriving another of federally protected rights.

In 1961, The United States Supreme Court held that a municipality was not a "person" subject to an action for damages for the unlawful acts of its employees within the purview of 42 U.S.C. Section 1983. *Monroe v. Pape*, 365 U.S. 167 (1961). More than a decade later, *Monroe* was reaffirmed in *Moor v. County of Alameda*, 411 U.S. 693 (1973) and then extended in *City of Kenosha v. Bruno*, 412 U.S. 507 (1973). In *Kenosha*, this Court pointed out that the word "person" in

Section 1983 did not apply to a municipality where equitable relief was sought any more than where damages are sought. *Id* at 514.

In his complaint, the petitioner, Carl Bishop, names as defendants the City of Marion and two of its employees, the Chief of Police and City Manager, in their official capacities. Petitioner's primary allegation is that he was not given notice and a hearing prior to his dismissal in violation of the Fourteenth Amendment's guarantee of procedural due process, (A. 8) and the relief requested is reinstatement and back pay. (A. 9; Petitioner's brief, p. 6)

Petitioner's grievance is against the City of Marion. He does not allege personal culpability on the part of the City Manager or Chief of Police. He does not seek to hold either personally liable for he has not cast them as parties individually. (A. 3) There is no substantial accusation against either official that he acted outside the scope of authority or arbitrarily misused or abused lawfully delegated authority. The gravamen of the complaint against the two municipal officers is that they were instruments of the City. Their representative presence therefore adds nothing to jurisdiction.

Personal involvement and individual culpability are the target objects of 1983 relief. *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1972), cert. denied 404 U.S. 1049 (1972); *Bennett v. Gravelle*, 323 F.Supp 203, *aff'd*, 451 F.2d 1011 (1st cir. 1971), cert. dismissed 407 U.S. 917 (1972). When recovery is sought from the public treasury and parties are named defendants in their representative capacities, no jurisdiction to hear the claim exists for the statute is aimed at

individuals rather than the governmental entities which employ them. In *Moor v. County of Alameda, supra*, there were allegations of Section 1983 violations by the Sheriff, several deputies individually and their employer, the County of Alameda. Dismissal by the District Court of all claims against the County was affirmed by the Ninth Circuit Court of Appeals[1] and this Court.

Had petitioner in this case wished to asset a cause of action against the City Manager and Chief of Police as individuals, he could have done so simply by casting them as defendants individually. For though restricted in its impact against governmental entitics, effective redress for Section 1983 injuries by individuals is very much available, and such actions face no 1983 jurisdictional barrier.[2] Only last year this Court unanimously[3] reaffirmed the viability of Section 1983 in damage actions against individuals. *Scheuer v. Rhodes*, 94 S.Ct. 1683 (1974). In *Scheuer*, state executives were charged with abuse of their governmental powers. This Court concluded that:

> "When a state officer acts under a state law in a manner violative of the Federal Constitution, he 'comes into conflict with the superior authority of that constitution, and he is in that case stripped of his official or representative capacity and is subjected in his person to the consequences of his individual conduct' " 94 S.Ct. at 1687, quoting *Ex Parte Young*, 209 U.S. 123, 159-60 (1908).

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[1] *Moor v. Madigan*, 458 F.2d 1217 (9th Cir. 1972)

[2] By Section 1983's jurisdictional counterpart, 28 U.S.C. 1343.

[3] The decision was 8-0. Mr. Justice Douglas did not participate.

Petitioner's action is clearly not directed against a "person" and the complaint should be dismissed for its failure to state a claim cognizable under 42 U.S.C. Section 1983.

II. THE $10,000.00 JURISDICTIONAL REQUIREMENT OF 28 U.S.C. SECTION 1331(a) IS NOT SATISFIED BY ALLEGATIONS IN THE COMPLAINT, WITHOUT MORE, WHEN SUCH ALLEGATIONS HAVE BEEN DENIED.

An alternate basis for invoking jurisdiction of the Federal District Court was alleged by petitioner to be the necessary controversy requirement of 28 U.S.C. Section 1331(a). But as Judge Winter of the Fourth Circuit Court of Appeals noted in his dissenting opinion, "Whether $10,000.00 is at issue is sharply contested..." (Petition for certiorari, p. 29). Respondents have put petitioner to proof of this fact by specifically denying its existence. In view of respondents' denial, petitioner may not rest on mere allegation. He must prove the allegation. In *City of Kenosha v. Bruno, supra,* This Court said:

> "But although appellees in the Racine denials alleged jurisdiction pursuant to 28 U.S.C. Section 1331 as well as 1343, and in each complaint there was an allegation of an investment in a tavern of at least $20,000.00, the defendant municipal corporations answered by putting the appellees to their proof as to the amount in controversy. Since the cases were submitted and decided on cross-motions for summary judgment and stipulations of fact, and no stipulation as to the amount in controversy was filed, we cannot say on this state of record whether or not jurisdiction over the complaints was affirmatively established." *Id.* at 515.

As in *City of Kenosha, supra,* this case was submitted and decided by the District Court on cross-motions for summary judgment. Again, as in *City of Kenosha,* the Court"... cannot say on this state of record whether or not jurisdiction over the complaints was affirmatively established..." *Id.* at 515.

III. THE PETITIONER DID NOT HAVE SUCH AN INTEREST IN HIS EMPLOYMENT THAT HIS DISCHARGE AMOUNTED TO A DEPRIVATION OF LIBERTY OR PROPERTY.

A. *Petitioner's discharge from his public employment did not deprive him of a constitutionally protected property interest.*

Petitioner, Carl Bishop, employed by the City of Marion for two years and nine months, had passed from probationary status to permanent status after a period of six months continuous service. There was no written contract of employment nor any other specific agreement as to the term of his employment. He was discharged only after being notified on several occasions of deficiencies in his performance.

Petitioner does not contend that his discharge was other than in accord with provisions of the City's personnel ordinance. Rather, he contends that a belief on his part that his employment was secure had ripened into a constitutionally protected property interest when considered with the fact that no fellow officers had been fired during his employment, and that he had passed from probationary to permanent status. Without benefit of a contractural tenure provision, petitioner must necessarily rely on the theory of implied promise of con-

tinued employment to invoke pretermination procedural due process protection.

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, indeed, have a legitimate claim of entitlement to it." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 at 577 (1972).

Property interests are not granted or defined by the constitution but arise from other sources such as state law, mutually explicit understandings, express or implied contract, rules and regulations. *Board of Regents of State Colleges v. Roth, supra; Perry v. Sindermann*, 408 U.S. 593 (1972); *Arnett v. Kennedy*, 416 U.S. 134 (1974).

In *Arnett*, this court held that a federal civil service employee had a protected property interest in his job since, by statute, 5 U.S.C. Sec. 7501, he could be discharged only for cause.[4] On the other hand, no property interests are conferred "for example, where the applicable statutory or contractual terms, either expressly or by implication, did not provide for continued employment absent cause" *Id* at 167 n.2 (opinion of Powell, J.); Cf. *Board of Regents v. Roth, supra* at 578.

In determining whether any causes of removal are required, Justice White has reasoned" '... if there were, then the rule would apply that where causes of removal are specified by Constitution or Statute, as also where the term of office is for a

[4]The court went on to point out, however, that the employee's property interest was "conditioned and limited by the procedural limitations which had accompanied the grant of that interest." *Arnett* at 159.

fixed period, notice and hearing are essential. *If there were not, the appointing power could remove at pleasure or for such cause as it deemed sufficient.'* " (emphasis supplied) *Arnett v. Kennedy, supra* at 181 (separate opinion of White, J.) citing *Reagan v. United States*, 182 U.S. 419 (1901) and *Shurtleff v. United States*, U.S. 311 (1903). In accord with the above reasoning is the Court's decision in *Cafeteria and Restaurant Workers Union Local 473, AFL-CIO v. McElroy*, 367 U.S. 886 (1961), where it was pointed out that, absent legislation, government employment is terminable at the will of the of the appointing officer. *Id.* at 896.

Not only is there absent from the City of Marion's personnel ordinance any assurance of continued employment, but also absent are any specified causes for removal. The applicable portion of the ordinance states:

> "A permanent employee whose work is not satisfactory over a period of time shall be notified in what way his work is deficient and what he must do if his work is to be satisfactory. If a permanent employee fails to perform work up to the standard of classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the City Manager. Any discharged employee shall be given a written notice of his discharge setting forth the effective date and reasons for his discharge if he shall request such a notice." (A. 6-7, 15).

Reasonably interpreted, the ordinance permits, but does not require, the continued employment of a policeman if his work is satisfactory. To interpret satisfactory performance as a catalyst giving rise to an expectancy of job retention protected by procedural due process guarantees is unfounded. Common

and universal understanding is that any employment contract is based on satisfactory performance. Although the ordinance is mandatory with respect to notifying employees of areas of deficient performance, it is merely permissive as to their dismissal for failure to adequately perform.

For obvious reasons, efficiency and discipline within a police department are of controlling importance. To pit a policeman discharged because of unsatisfactory performance against the supervisor who fired him in the adversary arena of an evidentiary hearing would serve only to hinder efficiency and make discipline more difficult to maintain. More importantly, it would likely do nothing to change the outcome. As Mr. Justice White stated in *Arnett, supra* at 185 (separate opinion of White, J.), "... if the termination were for reasons of pure efficiency, assuming such a general reason could be given... it would be at least arguable that a hearing would serve no useful purpose, and that judgments of this kind are best left to the discretion of administrative officials."

The City's personnel ordinance does no more than set forth a broad spectrum framework within which city employees are expected to work. The so-called "causes" for discharge which petitioner contends the ordinance contains are, if anything, simply guidelines by which performance may, but is not required to, be governed. The ordinance is not all inclusive, and it delineates no specific areas of misconduct mandating discharge. In sum, it provides for a standard of employee conduct which would be expected of any employee in any job, public or private - satisfactory work for the job held.

Petitioner's reliance on "permanent" status granted by the city's personnel ordinance to support his theory of an implied promise of continued employment is misplaced. Under North Carolina law, contracts of "permanent" employment, nothing else appearing, generally fall into the category of those terminable at the will of either party.[5] *Malener v. Jewelry Co.*, 223 N.C. 148, 25 S.E.2d 436 (1943). The rule is equally applicable to public employees. *Still v. Lance*, 279 N.C. 254, 182 S.E.2d 403 (1971). In *Lance*, a public school teacher sued for damages for the alleged wrongful termination of her employment contract. In discussing the contract, the Supreme Court of North Carolina concluded:

> "Upon its face, it contains no provision concerning the duration of the employment or the means by which it may be terminated. Nothing else appearing, such a contract of employment, even though it expressly refers to the employment as *'a regular, permanent job,'* is terminable at the will of either party." (emphasis supplied) *Lance*, 182 S.E.2d at 406.

B. *The Petitioner's discharge did not deprive him of a constitutionally protected liberty interest.*

The only reasons for discharge appearing in Petitioner's personnel file and, therefore, all that is available for inspection or review for job reference inquiries is that he was discharged for unsatisfactory work and failure to attend training schools.

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[5]However, the rule is otherwise and the result different if the word "permanent" is qualified, such as permanent employment for the term of at least 10 years. *Jones v. Light Co.*, 206 N.C. 862, 175 S.E. 167 (1934).

Hardly pernicious or unlikely to wrongfully injure Petitioner's reputation, these are not reasons for which a hearing is necessary to clear his name.

In support of his claimed liberty deprivation, Petitioner's brief (p. 33, 35) and the brief of *Amicus* (p. 11) seek to attach significance to the affidavit of Chief of Police Wood which was submitted to the Federal District Court in support of respondents' motion for summary judgment. The affidavit relates, in part, "Officer Bishop was relieved of his duties because of insubordination, failure to attend training classes, and acts unsuited to a police officer." (A. 32-34). The respondents do not disclaim responsibility for the affidavit, but point out that it was written and submitted to the court in response to the suit filed by Petitioner - quite sometime after his discharge.

Perhaps Petitioner could have used the affidavit properly in a trial where facts may be hotly contested, but this case was decided by the district court judge, as a matter of law, on cross motions for summary judgment. 377 F.Supp. 501 (1973). (Petition for certiorari, p. 12-24).

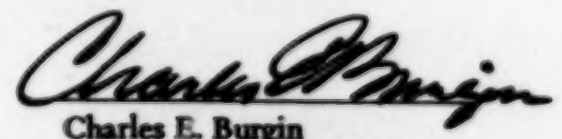
Future employment opportunities are not threatened here. The possibility of serious damage to Petitioner's reputation is simply not present. Allegations of dishonesty and immorality are not made. In short, no charges implicating a liberty interest are official reasons for Petitioner's discharge. All that is present in this case is the loss of a job and that, in itself, is not a deprivation of liberty. See *Arnett v. Kennedy*, 416 U.S. at 134 (opinion of Rehnquist, J.). In acknowledging that constitutional restraints exist upon governments

in their dealings with employees "is not to say that all such employees have a constitutional right to notice and hearing before they can be removed." *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, supra*, at, 896, 898.

CONCLUSION

For the reasons stated in Parts I and III of this brief, this Court should affirm the judgment of the Court of Appeals. Alternatively, for the reasons stated in Part II of this brief, the Court should remand the case to the District Court for the purpose of determining whether jurisdiction can be established pursuant to 28 U.S.C. Section 1331(a).

Respectfully submitted,



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